KWAME M. KILPATRICK, MAYOR
CITY OF DETROIT
EXECUTIVE OFFICE

COLEMAN A. YOUNG MUNICIPAL CENTER
2 WOODWARD AVE., SUITE 1126
DETROIT, MICHIGAN 48226
PHONE 313•224•3400
FAX 313•224•4128
WWW.CI.DETROIT.MI.US

August 28, 2008

Mr. Kelly Keenan Esq.
Legal Counsel to the Governor
The Honorable Jennifer M. Granholm
George W. Romney Building
111 South Capitol Avenue
Lansing, Michigan 48909

Re: Opinion and Order

Dear Mr. Keenan,

Given the very public nature of this process, with publication of all of the documents and pleadings on the web, my client must respond to the Governor's Opinion and Order. Ordinarily, one could file an appeal, or seek permission to do so, but in this case that option is not available to Respondent. At the risk of being accused by opposing counsel of litigation by "letter", it is nonetheless important to express our view that this process is irreparably tainted and does not offer even the most minimal protections to the Respondent or to the people of the City of Detroit. The people have a right to select their elected officials and that right should not be abridged by this process without a countervailing need to protect their interests.

Moreover, less than twelve hours after you received the Mayor's Reply, this Opinion and Order was faxed to the parties. Undoubtedly, it was drafted in advance and without regard to any of the evidence submitted in the Reply. The Reply provided you with irrefutable evidence that the City Council knew of the allegations against the Mayor before they approved the settlement in the Brown case. Thus, at a minimum, the charge of "failure to obtain informed consent" should have been dismissed.

This is not surprising given the position that the Governor took from the outset of this matter, when we all met behind closed doors to discuss the issues. We do not suggest that the meetings themselves were improper: The Governor said that she had ex-parte discussions with business leaders, etc. and that she would continue to have them with all of the parties involved in this matter. While we were concerned about her doing that, we did not dispute it for two reasons: Our respect for her as our Governor and our belief in her impartiality. It became very clear, from what was said, in a conversation

that we had with the Governor, in the hallway, after our meeting with the Prosecutor, on May 27th, that the decision to remove the Mayor had been made. The decisions as to **how** he will be removed, we are informed, are what have been the subject of every meeting that has occurred since May 27th. As you know, Respondent was never invited to any additional meetings, save one which was cancelled.

In that regard, the issues have been "how many felonies", and not whether the Mayor had any defenses to the charges. The effort to find a way to get him to agree to leave office has been the subject of the meetings held since May 27th. Upon information and belief, there have been meetings (since the first one to which we were invited) with business leaders, the Prosecutors, the Federal authorities, the Grievance Commission, the lawyer for the City Council, Council members, etc ---but never once were any of the meetings focused on any possibility of the success of the Mayor's defenses or the wrongfulness of the numerous governmental agencies' effort to remove the Mayor from office. If you will recall, right from the start, the Governor's position was "it looks bad for the State, he has to resign".

For these reasons, it is very clear to us that this hearing is an exercise in futility for the Mayor. The positioning of this process, by all of those involved, was intended to deprive and has deprived the Mayor of any witnesses to support his position.

The threshold determination that the conclusory allegations of the petition of City Council are sufficient to require a hearing to remove the Mayor is unfounded. The standard that the Governor used, that which is applicable to a summary proceeding, requires an analysis of the factual allegations of a complaint, not the conclusions. The facts themselves are not specifically set out anywhere in the petition; only the conclusions reached by Mr. William Goodman, the counsel for the City Council. The law is clear that the analysis any court must make is whether the alleged FACTS, construed most favorably to the plaintiff would bar the plaintiff's action. The facts have never been set out in any format that could be used for the Governor to make that analysis. We received books filled with transcripts with no reference to what line or page a witness testified to any of the facts needed for such a determination. Simply put, an allegation that the Mayor failed to disclose information to the Council is a conclusion and there has been no evidence to support that conclusion: i.e. what is it that suggests that the Mayor is ever involved in disclosures of this nature and/or what procedures are there for council to resolve cases that suggest that any allegations of improper conduct by an office holder should be revealed to Council?

Additionally, the Opinion and Order reads more like the brief of an advocate than it does the ruling of a fact-finder. You reference the Detroit City Charter provisions as a basis for a finding of "official misconduct" but ignore a decision of the Wayne County Circuit Court that found that neither provision under which City Council attempted to remove the Mayor is applicable to forfeiture proceedings. (See attached transcript of the

decision of Judge Robert Zilkowski, Attachment A) However, in deciding that the Governor is able to consider the content of the alleged text messages, you reference a decision of the Eastern District of Michigan in the Flagg case, a case brought by the son of a murdered woman alleging that the city failed to diligently investigate her murder. This decision was not attached to your opinion but Respondent has obtained a copy of it and the decision does not explain how Respondent, who was not the Mayor in 2000, could have authorized a policy that waived privacy rights of all city employees from 2002 to date.

Nowhere in the opinion is it mentioned that there was a jury verdict which, with costs and attorneys fees, amounted to more than the settlement amount and which the Council insisted had to be paid.

At page 7, you seem to suggest that there is a kind of supervisory authority that the Mayor is held to be accountable for the decisions of the Corporation Counsel, whether he expressly authorized them or not. There is no provision of the Charter cited that suggests that anyone, other than the City Council, is required or allowed to approve a settlement. Oddly enough, the City Council is not trying to remove the Corporation Counsel, who is the only person by Charter who recommends the settlement of any case.

In support of your opinion that official misconduct may be found in the allegations of the City Council, you cite cases where public officials took money from the treasury, and/or failed to perform acts "enjoined on him by law": Yet, nowhere do you reference any provision that requires approval of a settlement recommendation by the Mayor. You indicate that the Mayor is the CEO of the City and seem to suggest that fact alone gives him a duty to become involved in every case and every settlement recommendation. (The City receives over 2500 new cases each year).

Most notably, you assert that the affidavit of the Council President was filed "individually and in his capacity as President of the Council", a patently false statement. The affidavit is captioned in the Council President's official capacity and there is no basis whatsoever to assert that he filed it as an individual, except to fortify your position that the petition is valid since it COULD have been filed by only one person.

In a circular analysis, you say that the Council does not have to observe its own rules, and that the issue of whether the vote must be by super-majority or simple majority is somehow open to case-by-case decision of the Council, so long as the action is "otherwise conform(ing) with charter requirements". The Charter requires Council to make its own rules: Apparently, you are suggesting that Council must make the rules but the Charter does not really intend for them to follow the rules?

You mistake the Respondent's argument for minimal due process rights (which even the Governor has admitted the Mayor is entitled to) for a claim that he has a property interest in the office. No one ever argued that. It is clear that the level of due process afforded in a criminal prosecution is far beyond that required in an administrative proceeding. Moreover, whether the Mayor has a right to suspend the Governor's proceedings is not the issue: In this situation, he argues that they should be suspended on the particular facts of this case, not that he has a right to a stay.

Without reference to any support for your conclusion that there is a need to protect the public interest from their chosen elected Mayor, you assert that the process in which you are engaged in "non-punitive" in nature. As you must know, should the Mayor be acquitted, or the case against him dismissed, a judgment of ouster by the Governor could not stand. People v. Neri, 123 Ill. App. 2d 78 (1970)

The Opinion and Order asserts that the Mayor will not be required to testify as if that ruling is somehow different than that which is applied to all of the witnesses. The Governor has said she has no ability to compel anyone to testify. (Cases cited by our opponent, Mr., Goodman, suggest otherwise.) One would have to assume that includes the Mayor. The problem is that the Governor is accepting one sided "testimony" from the Petitioner: The Governor is fully aware that the governmental agencies have all cooperated in holding now five simultaneous proceedings (Governor, Council, Attorney General, Bar Grievances and Prosecutor) on these same issues and that witnesses have been threatened with prosecution, as well as brought before the Bar in challenges to their right to practice law. They understandably have refused to testify: Yet, the Governor seems to ignore the reality of the unavailability of any defense witnesses, save the Mayor's own testimony. Yes, some of the cases say it is a Hobson's choice, whether to testify or not; difficult but not unconstitutional --------but those **are not** cases in which access to ALL other evidence has been denied to the respondent. They **are not** cases in which the trier of fact declined to compel the testimony of other witnesses, as in this case.

It appears that the task of dealing with the Respondent's various claims became tiring and so the last five paragraphs of the Opinion and Order were given short shrift and all found to be "irrelevant and without merit". Most of the claims were mischaracterized and so for the record:

-After mentioning the violations of the Detroit Charter as a reason for removal, in contradictory fashion, the opinion goes on to say that the fact that the Charter does not provide for removal on the basis asserted by Petitioner is "irrelevant and without merit".

-The Opinion and Order completely mischaracterizes the "ex-post-facto" argument by Respondent. It is not the "rules and regulations" applicable to the conduct of a hearing that are at issue, it is the substantive basis for a finding of "official misconduct".

-No analysis whatsoever is provided with regard to the Respondent's position that the investigation by Petitioner was not a fact-finding process. In fact, there has been no fact-finding whatsoever by any entity. The Opinion and Order simply avers that Respondent is being given an opportunity to rebut and challenge the "investigation and other evidence" submitted by Petitioner; once again ignoring the unavailability of witnesses to the Respondent.

-The question of the constitutionality of the Perjury statute relates to the likelihood of acquittal on the Prosecutor's charges, nothing more.

-Most unbelievably, the Opinion and Order suggests that Respondent does not know the difference between a criminal and civil proceeding and is somehow confused. The issue of the admissibility of the "text messages" pursuant to the Stored Communications Act is an important one in all of the pending cases. Without any analysis at all, the Opinion and Order simply insists that the former City administration's policy (dated in 2000 before Kwame Kilpatrick was elected Mayor) waived the constitutional right of privacy that any employee of the City might have. Even if that policy were valid, and it is not, it could not waive constitutional rights. The City never adhered to the former administration's 2000 policy and there is no evidence to the contrary; nor does the 2000 policy in any way control this proceeding, as the Mayor and his appointees are not subject to the policy and have never received, or signed off on it.

Finally, with regard to your Opinion and Order Addressing Legal Issues Raised by Respondent in Pre-Hearing Correspondence, the questions raised were again, mischaracterized and not answered.

The issue as to the Council members testimony was raised in a number of contexts, one of them being the use of "immunity" as a bar to the usual requirement that a plaintiff cannot refuse to testify in a case that he brings. We still have no response to our inquiry as to why the Council members are not being required to appear in support of a petition that they filed. Respondent objects to the Governor proceeding without the witnesses who have filed the petition. Again, this is not a "motion", it is an objection, which we believe we are free to raise by letter.

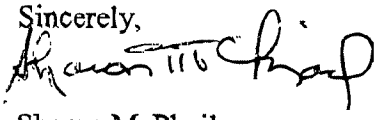
The issue of "immunity" for the witnesses and Respondent is an important one, in that they are all under some threat of prosecution or bar grievance. In that the Governor was having private meetings to broker such things as the payment of attorneys' fees, it seems to us that she could also have asked the appropriate officers to assist the process in making it possible for witnesses to appear voluntarily.

Finally, again, while the question of a "pardon" would have to await a "conviction", there does not seem to be any impediment to the Governor agreeing to offer one, in the event of a conviction: This would enable the Respondent to consider offering his own testimony without risking waiver of his Fifth Amendment rights. To your

suggestion that the cases cited by Respondent on the Fifth Amendment issue are not applicable here, we respectfully disagree. What Respondent is arguing is that the unavailability of subpoena power, whether by choice or law, places Respondent in a position of not having witnesses. This position is one that is not of his making, but of the several governmental authorities conferring behind closed doors to conduct parallel proceedings against him and against all of the potential witnesses.

The right of the voters to choose their elected officials is an important one and should be respected, certainly by the highest elected official in the State. When the Mayor was not defeated by the hand-picked candidate of certain members of the local media, they set out to do what they could not do in the voting booths of Detroit. The Governor should not interfere in the political process in this manner and her willingness to do so will be the defining moment in her administration. Her legacy is worth more than that, or it should be.

Sincerely,



Sharon McPhail
Counsel to the Mayor of the City of Detroit

Cc: William Goodman
David Whitaker
James Thomas